(2) (2)

No. 96-1550, 1551

FILED

MAY 1 1997

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERAN AFFAIRS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ALASKA, ARIZONA, HAWAII, KANSAS, MASSACHUSETTS, MICHIGAN, MONTANA, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA SUPPORTING PETITIONERS

FRANKIE SUE DEL PAPA, ESQ.
Attorney General of Nevada
JOHN ALBRECHT,* Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: 702-687-5024
Attorneys for Amicus Curiae
*Counsel of Record
[Additional Counsel listed on inside covers]

18 pp

BILL PRYOR
Attorney General
State of Alabama
11 South Union Street
Alabama Statehouse
Montgomery, Alabama 36130

BRUCE M. BOTELHO
Attorney General
State of Alaska
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300

GRANT WOODS
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926

MARGERY S. BRONSTER
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

CARLA J. STOVALL
Attorney General
State of Kansas
301 S.W. 10th Avenue
Topeka, Kansas 66612-1597

SCOTT HARSHBARGER
Attorney General for the
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

[Additional Counsel listed on inside back cover]

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS 3

II. WHETHER AN ARBITRATION PANEL MAY ORDER A REMEDY IS AN IMPORTANT MATTER UNDER SUPREME COURT RULE 10 4

III. THE SECRETARY HAS INTERPRETED THE ACT TO SAY THAT A FINAL AND BINDING DECISION INCLUDES A REMEDY. THE COURT SHOULD DEFER TO THAT DECISION 6

IV. THE WORDS OF THE ACT REQUIRE A DECISION OF AN ARBITRATION PANEL TO INCLUDE A REMEDY 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Atchison, Topeka, and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed. 2d 694 (1984) 7

Delaware Dept. of Health and Social Services, Div. for Visually Impaired v. U.S. Dept. of Educ., 772 F.2d 1123 (3d Cir. 1985) 4

Gardebring v. Jenkins, 485 U.S. 415, 430 (1988) 8

Georgia Dept. of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 3, 5

Helms v. McDaniel, 657 F.2d 800 (5th Cir., 1981) *cert. denied*, 455 U.S. 946 4

Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996) 3, 5

McNabb v. U.S. Dep't. of Educ., 862 F.2d 681 (8th Cir. 1988) (per curiam), *cert. denied, sub nom* 4

McNabb v. Cavazos, 493 U.S. 811 (1989) 4

TABLE OF AUTHORITIES - Continued

Minnesota Dept. of Economic Security v. Riley, 18 F.3d 606 (8th Cir. 1994) 3

Philbrook v. Glodgett, 421 U.S. 707, 713-714, 95 S.Ct. 1893, 1898-99 44 L.Ed.2d 525 (1975) 9

Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) 3

Slack v. State of Del. Dept. of Public Instruction, 826 F. Supp. 115 (D.Del. 1993) 10

Smiley v. Citibank, _____ U.S. _____, 116 S.Ct. 1730 (1996) 7

Tennessee Dept. of Human Services v. U.S. Department of Educ., 979 F.2d 1162 (6th Cir. 1992) 4

Thomas Jefferson University v. Shalala, 512 U.S. 504, 114 S.Ct. 2381 (1994) 8

U. S. v. Mississippi Vocational Rehabilitation for the Blind, 794 F. Supp. 1344, *amended*, 812 F. Supp. 85 (S.D. Ms. 1992) 3

OTHER CASES

20 U.S.C. § 107(a) 4

20 U.S.C. § 107(b) 6

20 U.S.C. §§ 107-107f 1

20 U.S.C. § 107d-1(a) 3, 4, 5

OTHER CASES - Continued

20 U.S.C. § 107d-1(b) 3, 4, 5, 6, 8, 10

20 U.S.C. § 107d-2 3

20 U.S.C. § 107d-2(a) 5, 6, 9, 10

20 U.S.C. § 107d-2(b) 2, 5

20 U.S.C. § 107d-2(b)(1) 5

20 U.S.C. § 107d-2(b)(2) 5, 7, 9, 10

20 U.S.C. §§ 1400-1484 10

20 U.S.C. § 1415(e)(1) 4, 10

34 C.F.R. § 395 5

34 C.F.R. § 395.16 5

34 C.F.R. §§ 395.34, .35, & .7 5

34 C.F.R. § 395.37(b) 7

INTEREST OF THE AMICI CURIAE

States are deprived of an effective dispute resolution procedure in disagreements with federal agencies arising under the Randolph-Sheppard Act (20 U.S.C. §§ 107-107f and hereafter referred to as "the Act") by the decision below. The Act gives blind persons licensed by a State licensing agency priority to operate vending facilities on federal property. Disagreements between the States on behalf of blind vendors and the federal property managers are decided under an arbitration procedure. The court of appeals's decision holds that an arbitration panel can not order a remedy if it finds the federal government violated the Act.

The Amici States have instituted or may institute the arbitration procedures in response to a federal agency's refusal to provide the required facilities for blind vendors or other violation of the Act. For example, Nevada is currently in an arbitration proceeding on behalf of thirty eight per cent of the blind vendors placed on federal property within its State. The decision of the court of appeals undercuts the value of the arbitration panels and delays the proceedings because a federal agency is not compelled to comply with the Act regardless of the number of times a State proves its case. This harms blind vendors and encourages federal agencies to ignore the Act. The issue is not unique to Maryland. It is of nationwide concern.

SUMMARY OF ARGUMENT

The holding of the court of appeals for the fourth circuit conflicts with the opinions of the courts of appeals for the eighth circuit and the District of Columbia circuit on whether an arbitration panel under the Act may include a remedy in its decision. This is an important issue as Congress created and expanded employment opportunities for blind persons by giving them priority to operate businesses on federal property. The Act's arbitration procedure resolves disputes between State agencies licensing the blind individuals and the federal property manager. The fourth circuit opinion that the arbitration panel's decision cannot include a remedy destroys the effectiveness of that procedure. This is because a federal agency found to violate the Act may simply continue violating the Act without having to change any acts or practices.

In addition, courts defer to agency interpretation of a statute. The Secretary of Education resolved any ambiguity in the Act by regulation and by the decision of an arbitration panel which is a final agency action. Further, the Secretary's arbitration panel included a remedy in its decision. The court below did not defer to the Secretary's interpretation of the Act in regulation and in the arbitration panel's decision.

Finally, the court below incorrectly interpreted the plain language of 20 U.S.C. § 107d-2(b). The one sentence relied upon by the court of appeals instructs a federal agency found violating the law to stop all acts or practices in violation of the law and to implement the arbitration panel's decision including the remedy. That sentence does not take away the arbitration panel's authority to include a remedy in its decision.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs*, 98 F.3d 165 (4th Cir. 1996) the court of appeals for the fourth circuit held that an arbitration panel deciding a dispute between a State and the federal government under the Act has no authority to decide a remedy if it finds the federal government violated the Act. This is consistent with the eleventh circuit court of appeals in *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990) and a district court in *U. S. v. Mississippi Vocational Rehabilitation for the Blind*, 794 F. Supp. 1344, *amended*, 812 F. Supp. 85 (S.D. Ms. 1992).

In contrast, the eighth Circuit and the District of Columbia Circuit ruled that an arbitration panel may order a remedy when it concludes a federal agency violated the law. In *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) the court of appeals dismissed an action brought under the Act for failure to exhaust an administrative remedy. It held that an arbitration panel had "broad remedial powers under the Act." 795 F.2d at 109. The possible remedies included invalidating contracts issued by federal agencies to businesses, prospective relief as to future contracts, and placing blind vendors at selected federal properties. Similarly, the eighth circuit court of appeals affirmed an order requiring the U.S. Department of Veterans Affairs to follow the permit procedure established by the Act. *Minnesota Dept. of Economic Security v. Riley*, 18 F.3d 606 (8th Cir. 1994).

The same or similar sections of law (20 U.S.C. §§ 107d-2 and 107d-1(a) and (b)) define the authority of an

arbitration panel in disputes between a blind vendor and a State as in disputes between a State and the federal government. The courts of appeals of three circuits have ruled that an arbitration panel may include a remedy when deciding disputes between a State and a blind vendor. *Delaware Dept. of Health and Social Services, Div. for Visually Impaired v. U.S. Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985) (arbitration panel may award compensatory damages and attorney's fees in a decision under 20 U.S.C. § 107d-1(a) which has same words as 20 U.S.C. § 107d-1(b)); *McNabb v. U.S. Dep't. of Educ.*, 862 F.2d 681 (8th Cir. 1988) (per curiam), *cert. denied, sub nom. McNabb v. Cavazos*, 493 U.S. 811 (1989) (arbitration panel may award prospective damages); *Tennessee Dept. of Human Services v. U.S. Department of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (arbitration panel may award accrued vending machine income). See also *Helms v. McDaniel*, 657 F.2d 800 (5th Cir., 1981) *cert. denied*, 455 U.S. 946 for consideration of the meaning of the term final decision under the Individuals with Disabilities Education Act in 20 U.S.C. § 1415(e)(1).

In summary, the decision of the fourth circuit court of appeals conflicts with the decisions of the court of appeals of the eighth and District of Columbia circuits. The Court should grant a petition for certiorari.

II. WHETHER AN ARBITRATION PANEL MAY ORDER A REMEDY IS AN IMPORTANT MATTER UNDER SUPREME COURT RULE 10.

A writ of certiorari should be granted because this is an important matter not yet decided by this court. The purpose of the Act is to provide employment opportunities to blind people. Title 20 U.S.C. § 107(a) states:

> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in

> striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

The United States Secretary of Education (hereafter, "Secretary") promulgated regulations implementing the Act. 34 C.F.R. pt. 395. Under the regulations, a State submits a permit including the terms and conditions of operating the facility to the federal property manager. 34 C.F.R. § 395.16. If the federal department approves the permit, it is issued to the State agency. The State agency places a blind vendor at the federal property to operate a vending stand. 34 C.F.R. §§ 395.34, 395.35, and 395.7.

In 1974, the Congress amended the Act to include arbitration procedures to resolve disputes between States and the federal government. Section 206, Pub.L. 93-516, codified at 20 U.S.C. §§ 107d-1(b), 107d-2(a), and 107d-2(b)(2). Disputes between the blind vendor and a State agency are governed by 20 U.S.C. §§ 107d-1(a), 107d-2(a), and 107d-2(b)(1). A blind vendor may not file an arbitration complaint directly against the federal government. *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990).

The decision in *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs,* 98 F.3d 165 (4th Cir. 1996) weakens the enforcement mechanism available to blind vendors and the State licensing agencies which protect them. Essentially, the fourth circuit court of appeals held that an arbitration panel may only find if a federal agency violated the Act. Any specific steps or remedies to comply with the Act must be determined by the federal agency which violated the law already. If a State licensing agency believes the remedy proposed by the federal property manager also violates the law, the State agency must file another complaint convening another arbitration panel. 98 F.3d at 171.

Presumably, a second arbitration panel could agree with the State agency determining the federal agency violated the law. Once again, the second panel could not order any specific remedy. Rather, the federal property manager would propose another action which could violate the law forcing the State to file a third arbitration complaint. There could be no end to the procedure while a blind person licensed by a State agency remains unemployed.

Blind vendors are already limited by statute in the procedures they may use to obtain compliance with the "priority" established by 20 U.S.C. § 107(b). They cannot file arbitration complaints directly against the federal property manager where their business is located. The Act is weakened if a federal agency may simply not comply with the law.

In summary, the Congress has established a priority for blind people to operate vending stands on federal property. The law currently provides no direct dispute resolution procedure for disputes between the blind vendor and the federal government. The decision below weakens the ability of State agencies to advocate on behalf of the blind population who are to benefit from this law.

III. THE SECRETARY HAS INTERPRETED THE ACT TO SAY THAT A FINAL AND BINDING DECISION INCLUDES A REMEDY. THE COURT SHOULD DEFER TO THAT DECISION.

Three sections of the Act describe the arbitration panel's decision in disputes between State licensing agencies and federal property managers. First, 20 U.S.C. § 107d-1(b) states, "...the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

Next, 20 U.S.C. § 107d-2(a) says, "Such panel shall, in accordance with the provisions of subchapter II of chapter

5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." Finally, 20 U.S.C. § 107d-2(b)(2) says,

> "If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel."

The fourth circuit court of appeals relied upon this last section in making its decision.

Courts defer to agency interpretation of statutes. *Smiley v. Citibank*, _____ U.S. _____, 116 S.Ct. 1730 (1996). *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed. 2d 694 (1984). Here, the Secretary's regulation stated the decision was final subject only to review Administrative Procedures Act ("APA"). Title 34 C.F.R. § 395.37(b) states:

> "... (the panel's) decision which shall be final and binding on the parties except that such decision shall be subject to appeal and review as a final agency action for purposes of the provisions of 5 U.S.C. ch. 7."

In this case, the Secretary analyzed all three sections of the Act passed by Congress. He decided that the decision of the arbitration panel was to be final subject only to review under the APA. The Secretary had the opportunity to review the ambiguity, if any, created by the Act and decided to

interpret these three sections of the statute as creating a final decision including a remedy.

This is further shown by the Secretary's decision in this case. On behalf of the Secretary, the arbitration panel ordered the Department of Veterans Affairs to provide a specific remedy, that is, a permit to the Maryland State licensing agency to operate a vending facility. Agency decisions in interpreting agency regulation are entitled to deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 114 S.Ct. 2381 (1994). As Justice Stevens wrote in the majority opinion in *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

> (W)hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

In this case, the Secretary has interpreted the Act to provide for a final decision which includes a remedy. The arbitration panel on behalf of the Secretary issued a decision including a remedy. The Court should defer to the Secretary's interpretation that a final and binding decision includes a remedy.

IV. THE WORDS OF THE ACT REQUIRE A DECISION OF AN ARBITRATION PANEL TO INCLUDE A REMEDY.

In this case, three different sections of law must be considered to decide if a remedy is to be included in a final decision of an arbitration panel. Title 20 U.S.C. § 107d-1(b)

describes the decision as final and binding. Title 20 U.S.C. § 107d-2(a) says the decision is a final agency action subject to judicial review under the Administrative Procedures Act.

The court below relied exclusively upon 20 U.S.C. § 107d-2(b)(2) which says,

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

The plain language of this statute supports the States. This sentence instructs federal property managers to: (1) stop any violations of the Act found by a panel; and (2) take any other action needed to carry out the decision of the panel. It does not prohibit an arbitration panel from including a remedy in its decision. An arbitration panel appointed under the Act may include a specific remedy in its decision.

Rules of statutory construction support this plain reading of 20 U.S.C. § 107d-2(b)(2). Remedial statutes should be interpreted liberally. *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). Further, as the Court stated in *Philbrook v. Glodgett*, 421 U.S. 707, 713-714, 95 S.Ct. 1893, 1898-99 44 L.Ed.2d 525 (1975) which states:

> "In expounding a statute, we must not be guided by a single sentence or member of sentence, but look to the provisions of the whole law, and to its object and policy." (cites

> omitted)...Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will...."

Construing the Act liberally and looking at all three sections governing the contents of an arbitration panel decision, a decision may include a remedy. The decision is to be final and binding. 20 U.S.C. § 107d-1(b). It is to be a final agency action. 20 U.S.C. § 107d-2(a).

Court interpretations of the final decision requirement of the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-1484) support the principle that a final decision includes a remedy. Title 20 U.S.C. § 1415(e)(1) states:

> A *decision* made under subsection (c) of this section *shall be final*, except that any party may bring an action under paragraph (2) of this subsection. (emphasis added)

A hearing panel's decision finding a child with a disability was entitled to a private school placement but declining to decide at what school was not a final decision and violated this section. *Slack v. State of Del. Dept. of Public Instruction,* 826 F. Supp. 115 (D.Del. 1993). A decision which is final under federal statute must include a remedy.

The sentence of 20 U.S.C. § 107d-2(b)(2) relied on by the court below instructs a federal agency to stop the violations "promptly" and to carry out the decision of the panel. This instruction does not take away the authority to decide a remedy. Rather, it directs the federal agency to stop all violations and implement the remedy contained in the decision of the arbitration panel.

In conclusion, the court of appeals for the fourth circuit violated common rules of statutory construction in reaching its decision. The plain language of the statute describes the

arbitration panel's decision as final and binding. The sentence relied upon by the fourth circuit court of appeals directs the federal agency to stop violating the law and implement the decision of the panel including a remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 30, 1997.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
John Albrecht*
Senior Deputy Attorney General

Attorneys for the Amicus Curiae
State of Nevada

*Counsel of Record

[Other Counsel of Record Listed on Inside Covers]

FRANK J. KELLEY
Michigan Attorney General
Post Office Box 30212
Lansing, Michigan 48909

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
Post Office Box 201401
Helena, Montana 59620-1401

J. WALLACE MALLEY, JR.
Acting Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001

JAMES S. GILMORE, III
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 29219

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
Post Office Box 40100
Olympia, Washington 98504-0100

DARRELL V. MCGRAW, JR.
West Virginia Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305